

File

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
WEYERHAEUSER COMPANY
(Cosmopolis Pulp Mill),

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 1035

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal of eight \$100 civil penalties for alleged sulfur dioxide emissions, came on for hearing before the Pollution Control Hearings Board, Chris Smith and Dave J. Mooney, convened at Lacey, Washington on May 2, 1977. Hearing examiner William A. Harrison presided. W. A. Gissberg, Chairman of the Pollution Control Hearings Board has read the transcript of proceedings. Respondent elected a formal hearing.

Appellant, Weyerhaeuser Company, appeared by and through its attorney Jane Hotneier. Respondent appeared by and through its attorney Laura E. Eckert. Court reporting services were provided by Gene Barker,

1 Olympia court reporter.

2 Witnesses were sworn and testified; however, no exhibits were
3 offered. From testimony heard, the Pollution Control Hearings Board
4 comes to these

5 FINDINGS OF FACT

6 I.

7 Appellant owns and operates a sulfite pulping mill at Cosmopolis,
8 Washington.

9 II.

10 For the following periods on the following days, appellant's sulfur
11 dioxide emissions from its Cosmopolis mill exceeded an hourly average
12 of 800 parts per million (ppm) (dry):

| 13 <u>March 2, 1976</u> | <u>March 25, 1976</u> | <u>March 31, 1976</u> |
|-------------------------|-----------------------|-----------------------|
| 14 3 | 1 | 1-1/2 |
| 15 consecutive hours | hour | consecutive hours |
| | | [break] |
| | | 2-1/2 |
| | | consecutive hours |

16 These emissions emanated from the recovery system and acid plant.

17 III.

18 A Notice of Penalty Incurred and Due No. 76-205, dated May 12, 1976,
19 was served by respondent upon appellant. That notice imposed total civil
20 penalties of \$800 which sum respondent computed by multiplying, by \$100,
21 each hourly alleged violation of excessive emissions.

22 IV.

23 Any Conclusion of Law hereinafter stated which should be deemed
24 a Finding of Fact is hereby adopted as such.

25 FINAL FINDINGS OF FACT,
26 CONCLUSIONS OF LAW
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1 From these Findings the Pollution Control Hearings Board comes
2 to these

3 CONCLUSIONS OF LAW

4 I.

5 Respondent's emission standard pertinent to this matter,
6 WAC 18-38-030(4), states:

7 . . .
8 (4) Emissions from the recovery system and
9 acid plant, shall not exceed 800 ppm (dry) of
sulfur dioxide for any hourly average.

10 Appellant violated this regulation by causing the prohibited emissions.

11 II.

12 Appellant is subject to civil penalty under the State Clean Air
13 Act, specifically, RCW 70.94.431 thereof which states:

14 In addition to or as an alternate to any other penalty
15 provided by law, any person who violates any of the
16 provisions of chapter 70.94 RCW or any of the rules
17 and regulations of the department or the board shall
18 incur a penalty in the form of a fine in an amount
19 not to exceed two hundred fifty dollars per day for
each violation. Each such violation shall be a
separate and distinct offense, and in case of a
continuing violation, each day's continuance shall
be a separate and distinct violation.
. . .

20 III.

21 Appellant argues that the statutory phrase "continuing violation"
22 should be read as synonymous with "uninterrupted violation". Viewing
23 the facts of this case as we have found them, appellant contends
24 that only four violations have occurred because there were four
25 uninterrupted blocks of time, of varying duration, during which excessive
26 emissions occurred (See Finding of Fact II supra) and because of

1 the statutory phrase "each such violation shall be a separate and
2 distinct offense".¹ We must disagree.

3 Were the statute to be interpreted as appellant urges, one who
4 emits excessive sulfur dioxide for 24 consecutive hours would be subject
5 to one civil penalty up to \$250. On the other hand, one who has
6 excessive emissions for three hours, succeeds in bringing those emissions
7 into compliance for one hour, then emits excessively for one more hour
8 would be subject to two civil penalties, up to \$250 each. Such a
9 result is irrational in that it discourages a swift effort to curb
10 excessive emissions and, as illustrated, penalizes less those who have
11 polluted more.

12 IV.

13 We have been given no legislative history on the intent
14 of the "continuing violation" language. The interpretation of the
15 civil penalty provision must therefore be based upon the policy and
16 language of the State Clean Air Act.

17 The public policy and purpose of the State Clean Air Act chapter
18 70.94 RCW, is declared at RCW 70.94.011:

19 It is declared to be the public policy of the
20 state to secure and maintain such levels of air
21 quality as will protect human health and safety
22 and comply with the requirements of the federal
23 clean air act, and, to the greatest degree
practicable, prevent injury to plant and animal
life and property, foster the comfort and
convenience of its inhabitants, promote the

24 1. We have indicated that, as a general proposition, more than
25 one civil penalty up to \$250 may be assessed for one day's violations.
26 Puget Sound Air Pollution Control Agency v. American Smelting and
Refining Co., PCHB Nos. 55, 69, 76 and 93 (Conclusions and Order on
Informal Conference, April 4, 1972).

27 FINAL FINDINGS OF FACT,
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1 economic and social development of the state,
2 and facilitate the enjoyment of the natural
attractions of the state

3 Another section of the Act, RCW 70.94.331(2)(c), delegates to the
4 respondent the duty of establishing, by regulation, "emission standards":

5 . . .
6 (c) Adopt by rule and regulation air quality
standards and emission standards for the control or
7 prohibition of emissions to the outdoor atmosphere of
dust, fumes, mist, smoke, other particulate matter,
8 vapor, gas, odorous substances, or any combination
thereof. Such requirements may be based upon a system
9 of classification by types of emissions or types of
sources of emissions, or combinations thereof, which it
determines most feasible for the purposes of this chapter. . . .

10
11 Emission standards promulgated by respondent must, in the aggregate,
12 assure that the ambient air of this state will meet federal air quality
standards.² Not unexpectedly, where there are many sources and types
13 of air contaminants, there must be many varieties of emission standards
14 to achieve federally mandated air quality. While the emission standard
15 in this case uses an hourly rate to control sulfur dioxide (WAC 18-38-030(4))
16 another uses a three-minute standard to control visual opacity
17 (WAC 18-04-040(1)).³ Another uses a daily standard to control sulfur

18
19
20 2. See Federal Clean Air Act, Amendments of 1970 at 42 U.S.C.
§§ 1857 C-4 and 1857 C-5.

21 We note in passing that there is a presumption that the
emission standards adopted by Department of Ecology are valid.
22 Weyerhaeuser v. Department of Ecology, 86 Wn.2d 310, 314 (1976). Appellant
has not challenged the emission standard per se, only the issuance of
23 more than one penalty per "uninterrupted violation". Its argument
that the respondent could devise an emission standard with a one-minute
24 time period, and thereby increase penalties, is hypothetical. The
validity of such a standard, while not before us, would be dependent
25 upon whether such was a reasonable exercise of police powers.

26 3. Chapter 18-04 WAC was repealed and readopted as chapter
173-400 WAC on December 21, 1976, subsequent to the facts of this
27 appeal.

1 dioxide (WAC 18-38-030(1)). Many emission standards prohibit certain
2 levels of emission from the instant they occur, namely WAC 18-04-040(2)-(6),
3 governing particulate matter, materials handling contaminants, odors and
4 sulfur dioxide.

5 Aware that emission standards must be as varied as the pollution
6 sources they govern, we are now in a position to interpret the civil
7 penalty provision, RCW 70.94.431. The first sentence of that provision
8 states that any person who violates any of the regulations (emission
9 standard) shall incur a certain penalty for each violation. The second
10 sentence supplements the reader's understanding of the first by declaring
11 that "Each such violation shall be a separate and distinct offense . . .".
12 That is the heart of the penalty provision. The second sentence then
13 goes on, however, to introduce the concept of a "continuing violation".
14 We conclude that a "continuing violation" only takes place where the
15 pertinent emission standard prohibits an emission from the instant it
16 occurs, and where that emission continues. The term does not apply
17 where, as here, the pertinent emission standard proscribes a given
18 level of emission over a given period of time. In this situation,
19 each incident of excessive emission for the regulatory time period
20 constitutes a violation, justifying up to \$250 civil penalty.

21 By this interpretation, the civil penalty provision of the
22 statute does not conflict with the statutory goal of air quality
23 (RCW 70.94.011, supra, and Federal Clean Air Act, Amendments of 1970,
24 42 U.S.C. § 1857, et seq.) by penalizing uninterrupted pollution of
25

26 4. Id. footnote 3, supra.

1 long duration less than sporadic pollution of lesser duration. Likewise,
2 the civil penalty provision will not conflict with the statutory provision
3 allowing respondent to promulgate a wide variety of emission standards
4 (RCW 70.94.331(2)(c), supra).

5 V.

6 Respondent has proven seven hourly violations. However, those
7 separate half hour periods occurring on March 31, 1976, are not
8 supported by sufficient evidence to sustain them as hourly violations.

9 VI.

10 Any Finding of Fact which is deemed to be a Conclusion of Law
11 is hereby adopted as such.


12 From these Conclusions the Board makes this

3 ORDER

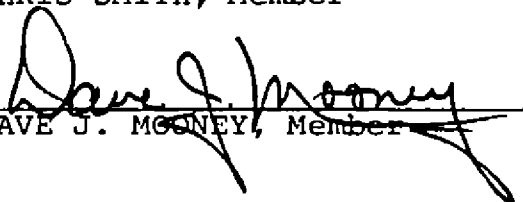
14 Respondent's Notice of Penalty Incurred and Due, Docket No.
15 DE 76-205, is affirmed as to seven of the eight alleged violations and
16 total civil penalties in the amount of \$700 are therefore affirmed.

17 DONE this 3^d day of August, 1977, at Lacey, Washington.

18 POLLUTION CONTROL HEARINGS BOARD

19 
20 W. A. GISSBERG, Chairman

21 
22 CHRIS SMITH, Member

23 
24 DAVE J. MOONEY, Member

25
26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW
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